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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Douglas Wayne Derello, Jr.,
10 Plaintiff,

No. CV 19-05884-PHX-MTL (JFM)

11 v.

ORDER

12 John McAdorey, et al.,
13 Defendants.
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15 Plaintiff Douglas Wayne Derello, Jr., who is currently confined in the Arizona State
16 Prison Complex-Florence, brought this civil rights action pursuant to 42 U.S.C. § 1983.
17 (Doc. 12.) Plaintiff seeks reconsideration of the Court's Order granting summary judgment
18 in favor of Defendant Avant-Ortiz (Doc. 40.)

19 **I. Background**

20 On screening under 28 U.S.C. § 1915A(a), the Court determined that Plaintiff stated
21 an Eighth Amendment medical care claim against Defendant Avant-Ortiz in Count Three
22 of his Third Amended Complaint. (Doc. 16.) The Court dismissed the remaining claims
23 and Defendants. (*Id.*) In a December 10, 2020 Order, the Court dismissed Plaintiff's claim
24 against Defendant Avant-Ortiz because Plaintiff failed to properly exhaust available
25 administrative remedies. (Doc. 38.) The Clerk of the Court entered Judgment the same
26 day. (Doc. 39.)

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II. Plaintiff's Motion

Plaintiff's Motion was filed on January 6, 2021,¹ and Plaintiff states that he is seeking relief pursuant to Rule 59(e) of the Federal Rules of Civil Procedure. (Doc. 40.) Plaintiff asserts that the Court should reconsider its summary judgment ruling because Plaintiff has "discovered new evidence not available at the time of summary judgment." (*Id.* at 2.) Plaintiff asserts that the new evidence consists of two administrative grievances he filed between July 1, 2019 and April 30, 2020, but that Plaintiff did not receive until November 8, 2020. (*Id.* at 3.)

Plaintiff asserts that one of the grievances he attaches to his Motion is a formal grievance dated August 17, 2019, and although it is illegible, Plaintiff claims that it says: "NP Avant-Ortiz, is being remised [sic], purposely by not calling me to address my pain she is my yard physician as I need to see her. I am suffering pain, [a]nd she is aware of my medication." (*Id.* at 3-4.) This grievance is not signed by prison staff. (*Id.* at 11.) Plaintiff asserts that the other grievance is an August 17, 2019 appeal to the Director related to a "different Emergency grievance [Plaintiff] filed about Avant-Ortiz" wherein Plaintiff complained that Avant-Ortiz was leaving him in pain by allowing his blanket to be taken and ignoring his request for indomethacin. (*Id.* at 4-5.) This grievance appeal is not signed by prison staff. (*Id.* at 13.)

Plaintiff attaches a Declaration to his Motion regarding grievances he filed against "Karr," but does not mention Avant-Ortiz in his Declaration. (*Id.* at 7.)

In Response, Defendant asserts that Plaintiff's Motion should be denied because Plaintiff provides no credible explanation for why the grievances Plaintiff allegedly submitted in 2019 were unavailable to Plaintiff when responding to Defendant's Motion and does not explain how the grievances create a disputed issue of fact as to exhaustion. (Doc. 42 at 1-2.) Defendant points out that Plaintiff did not request additional time to

¹ Although the Court's docket reflects that the Motion was filed on January 8, 2021, because the Motion is dated January 6, 2021, that is the proper date of filing. *See Houston v. Lack*, 487 U.S. 266, 276 (1988) (under the "prison mailbox rule," a document is deemed "filed" when delivered by the prisoner to a prison official for mailing).

1 respond to the Motion for Summary Judgment and did not previously seek to discover the
 2 grievances. (*Id.* at 2.) Defendant also asserts that, in response to the Motion for Summary
 3 Judgment, Plaintiff argued that obstacles prevented him from exhausting his administrative
 4 remedies, which conflicts with his current testimony that these grievances demonstrate that
 5 he exhausted his claim against Avant-Ortiz. (*Id.* at 3.)

6 **III. Legal Standard**

7 A Motion to Alter or Amend a Judgment pursuant to Rule 59(e) of the Federal Rules
 8 of Civil Procedure “must be filed no later than 28 days after the entry of judgment.” *See*
 9 Fed. R. Civ. P. 59(e). Moreover, “[a] Rule 59(e) motion should not be granted ‘unless the
 10 district court is presented with newly discovered evidence, committed clear error, or if
 11 there is an intervening change in the controlling law.’” *McQuillion v. Duncan*, 342 F.3d
 12 1012, 1014 (9th Cir. 2003) (quoting *McDowell v. Calderon*, 197 F.3d 1253, 1255 (9th Cir.
 13 1999) (en banc)).

14 “Relief from judgment on the basis of newly discovered evidence is warranted if
 15 (1) the moving party can show the evidence relied on in fact constitutes newly discovered
 16 evidence . . . ; (2) the moving party exercised due diligence to discover this evidence; and
 17 (3) the newly discovered evidence must be of such magnitude that production of it earlier
 18 would have been likely to change the disposition of the case.” *Feature Realty, Inc. v. City*
 19 *of Spokane*, 331 F.3d 1082, 1093 (9th Cir. 2003)

20 **IV. Discussion**

21 The grievances attached to Plaintiff’s Motion are not “newly discovered evidence.”
 22 Plaintiff created these documents and has not produced evidence about why he could not
 23 access these documents in responding to the Motion for Summary Judgment. Even
 24 assuming Plaintiff could not access the documents, he could have made arguments about
 25 these grievances in response to the Motion for Summary Judgment. Moreover, even
 26 assuming Plaintiff did not have access to the grievances at the time his response to the
 27 Motion for Summary Judgment was due, Plaintiff had the grievances in his possession
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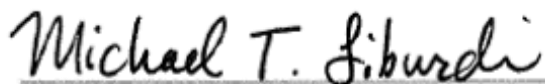
1 prior to when Judgment was entered in this action,² which prevents any finding that the
2 grievances are “newly discovery evidence.” *Feature Realty, Inc.*, 331 F.3d at 1093
3 (“Evidence ‘in the possession of the party before the judgment was rendered is not newly
4 discovered’”) (citation omitted).

5 Finally, the grievances still do not show that Plaintiff properly exhausted his
6 available administrative remedies. The grievances are not signed by prison officials, and
7 Plaintiff includes no details regarding when he turned the grievances in, who he gave them
8 to, or any other facts tending to establish a genuine dispute as to an issue of material fact.
9 Moreover, Plaintiff’s assertions that he exhausted his administrative remedies conflict with
10 his earlier assertions that he was prevented from exhausting his administrative remedies.

11 For all of the foregoing reasons, Plaintiff’s Motion for Reconsideration will be
12 denied.

13 **IT IS ORDERED** that Plaintiff’s Motion for Reconsideration (Doc. 40) is **denied**.

14 Dated this 20th day of April, 2021.

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17 Michael T. Liburdi
18 United States District Judge
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28 ² As noted above, Plaintiff asserts that he received the grievances in the mail on
November 8, 2020 and Judgment entered on December 10, 2020.